

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

BALLY GAMING, INC.,	)	NO. 61942-0-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
INTERNET ADVANCEMENT, INC.,	)	UNPUBLISHED OPINION
a Washington corporation,	)	
	)	
Appellant.	)	FILED: June 22, 2009
	)	

Leach, J. — This case raises the question whether a trial court, after converting an unlawful detainer action to an ordinary civil action, must grant a continuance to allow the parties more time to prepare for trial. We hold that under the circumstances presented here, the trial court did not abuse its discretion in denying a continuance. Internet Advancement also challenges evidentiary rulings made by the trial court and argues that the judgment amount is not supported by sufficient evidence. We affirm and award reasonable attorney fees to Bally Gaming.

**Background**

Internet Advancement, Inc., rented commercial office space from Bally Gaming, Inc., in Kirkland. The parties entered into a written sublease agreement (Sublease), which was signed by Dwayne Walker, Internet Advancement's chief executive officer

(CEO), on May 17, 2007, and by Mark Lerner, Bally Gaming's secretary, on May 18, 2007. Bally Gaming was a tenant of the premises, and the Sublease incorporated by reference the lease between Bally Gaming and The Plaza at Yarrow Bay, Inc. (Lease) which was attached to the Sublease.

The Sublease was for a term of 56 months, beginning on August 1, 2007, and ending on March 30, 2012. The initial base rent was \$22,240.25 per month, and it increased annually on April 1, according to a table printed in the Sublease. Rent was abated for the first two months of the Sublease, August and September 2007, on the condition that all obligations of the Sublease would be fully performed; the abated rent plus interest was to become due immediately in the case of default. In addition to base rent, the lease required advance payment of operating costs and real property taxes, also known as common area maintenance (CAM), in 12 monthly installments.

Internet Advancement ceased paying its lease obligations in February 2008. On April 25, 2008, Bally Gaming served Internet Advancement with a five-day notice to pay or vacate, notifying Internet Advancement to pay its outstanding rental obligations of \$160,530.83 or surrender the premises to Bally Gaming. On May 19, 2008, Bally Gaming filed a complaint for unlawful detainer, alleging that Internet Advancement breached the Sublease by failing to pay rent. In addition to restitution of the premises, the complaint requested damages in an amount to be proven at trial, costs, and reasonable attorney fees.

On May 30, 2008, after hearing Bally Gaming's motion to show cause why a writ

of restitution should not be granted, a King County Superior Court Commissioner ordered the issuance of a writ of restitution restoring the premises to Bally Gaming. Trial on the issue of damages was set for June 30, 2008.

On June 16, 2008, Internet Advancement moved to consolidate the unlawful detainer action with its action against Dwayne Walker, its former CEO. Internet Advancement argued that the cases arose from a common nucleus of facts and that Walker was a central figure in both cases because Walker violated his fiduciary duties to Internet Advancement when he agreed to the Sublease and failed to disclose its terms to the other shareholders of Internet Advancement. In response, Bally Gaming argued that Internet Advancement's suit against Walker was unrelated to the unlawful detainer action and that the court did not have subject matter jurisdiction to hear Internet Advancement's claims against a third party in an unlawful detainer proceeding. Dwayne Walker opposed the motion on similar grounds. In reply, Internet Advancement stated for the first time that possession was no longer an issue. It argued that the court should convert the lawsuit into an ordinary lawsuit for damages and consolidate it with their action against Dwayne Walker. The trial court denied Internet Advancement's motion to consolidate on June 24, 2008.

Despite the denial of its motion to consolidate, on June 25, 2008, Internet Advancement moved to continue the trial in order to perfect service of a third-party complaint upon Dwayne Walker. Internet Advancement made the same arguments in its motion to continue as it had in its motion to consolidate, namely, that Dwayne

Walker was an indispensable party who must be joined to ensure complete relief to all parties. The trial court did not reach the merits of this motion but denied it as untimely.

Before trial began on July 2, 2008, Internet Advancement renewed its motion to continue trial and asked the court to transfer the case to the regular civil calendar rather than trying the case that day. It argued that once the action was converted to an ordinary civil action, the trial court did not have jurisdiction to hear it on the expedited calendar. It also argued that the continuance would accommodate its motion to consolidate and allow it to bring in Dwayne Walker as a third-party defendant. For the first time, Internet Advancement summarily argued that it had not had sufficient time for discovery, without identifying any discovery that it needed to pursue.

Because the motion to consolidate had already been denied, the trial court declined to reconsider issues regarding whether Dwayne Walker should be made a party. The court noted that Internet Advancement did not have a right to any particular time for trial. The trial court converted the matter to an ordinary civil action for damages and heard argument regarding whether Internet Advancement would be prejudiced if the trial were to proceed as scheduled. The trial court held that proceeding with trial would result in no prejudice to Internet Advancement and denied its motion to continue. Trial commenced immediately.

Bally Gaming's only witness was John McCafferty, vice president for its western region. The Sublease, five-day notice to pay or vacate, and commissioner's order granting the writ of restitution were the only documents admitted into evidence.

Internet Advancement called a single witness, Todd Wickham, a shareholder of Internet Advancement who also served as its CEO before and after the periods relevant to the action. Wickham testified that Dwayne Walker had entered into the lease on behalf of Internet Advancement without the approval of Internet Advancement's board. He admitted that Internet Advancement had not paid its rent since February 2008. The trial court ruled against Internet Advancement.

On July 7, 2008, Internet Advancement filed a notice of discretionary review to this court. The next day, it brought a motion to stay further proceedings, including entry of judgment, based on its pending petition for discretionary review. In briefing for the motion, Internet Advancement again argued that the trial court's decision to proceed with trial on the expedited calendar resulted in its having insufficient time for discovery but again failed to identify what discovery it was unable to accomplish in the 30 days leading up to trial. It again argued that it was not afforded sufficient time to "join other necessary parties," an argument which had been squarely rejected when the trial court denied the earlier motion to consolidate. This motion was opposed by Bally Gaming, which argued that the motion was an attempt to postpone payment of the judgment. The trial court entered judgment against Internet Advancement for \$317,694.58 plus attorney fees and costs. The motion for discretionary review was converted to a direct appeal, which is now before the court.

#### Discussion

##### A. Timing of Trial

Internet Advancement argues that the trial court did not have “jurisdiction” to proceed with trial on the expedited calendar after the matter was converted to an ordinary civil action. However, Internet Advancement does not argue that the trial court lacked either personal or subject matter jurisdiction to hear the case. Thus, jurisdiction is not at issue, but rather it is the timing of trial that Internet Advancement challenges here. It argues only that while unlawful detainer actions must be heard on an expedited basis, actions converted to ordinary civil actions may not.

Unlawful detainer actions are limited to the issue of possession and related issues, such as restitution of the premises and rent.<sup>1</sup> Other than defenses that would excuse the tenant’s breach, claims unrelated to possession are generally not allowed, in order to protect the summary nature of the proceeding.<sup>2</sup> In an unlawful detainer action, the trial court sits as a special tribunal rather than a court of general jurisdiction and does not have subject matter jurisdiction over matters outside the scope of the unlawful detainer action.<sup>3</sup> However, a collateral rule allows the trial court to convert the matter to an ordinary action for damages once possession is no longer an issue.<sup>4</sup>

Our Supreme Court articulated this rule in Munden v. Hazelrigg,<sup>5</sup> explaining that the trial court’s conversion of a case involves the exercise of a certain amount of discretion:

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<sup>1</sup> Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985).

<sup>2</sup> Munden, 105 Wn.2d at 45.

<sup>3</sup> Sprincin King Street Partners v. Sound Conditioning Club, Inc., 84 Wn. App. 56, 66, 925 P.2d 217 (1996).

<sup>4</sup> Munden, 105 Wn.2d at 45-46.

<sup>5</sup> 105 Wn.2d 39, 47-48, 711 P.2d 295 (1985).

[T]he trial court has inherent power to fashion the method by which an unlawful detainer action is converted to an ordinary civil action. The court may require amended pleadings to convert the unlawful detainer to a civil suit. It may grant a continuance. In any event, once converted, the civil suit is no longer entitled to the calendar priority afforded an unlawful detainer action by RCW 59.12.130.

Once the case is converted, the trial court's general jurisdiction is restored and it can hear claims between the parties that were excluded from the unlawful detainer action.<sup>6</sup> The purpose of this rule is to promote judicial economy by avoiding a multiplicity of suits and to spare parties the expense and inconvenience of maintaining two suits.<sup>7</sup>

Here, it is uncontested that Internet Advancement vacated the premises before trial began and that the trial court converted the unlawful detainer action to an ordinary civil action for damages. Citing Munden for the proposition that converted actions are no longer entitled to calendar priority, Internet Advancement argues that the trial court erred in trying the case on its scheduled trial date. However, our Supreme Court in Munden did not mandate that parties be given more time to prepare for trial simply because a case is converted. The Court stated that the trial court "may grant a continuance,"<sup>8</sup> not that it is required to do so. Thus, while parties in a converted case are no longer entitled to calendar priority, they are not necessarily entitled to a continuance.

Here, it was not an abuse of the trial court's discretion to proceed with trial as scheduled. Internet Advancement was given an opportunity to show why it would be

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<sup>6</sup> Munden, 105 Wn.2d at 45-46.

<sup>7</sup> Munden, 105 Wn.2d at 46-47.

<sup>8</sup> Munden, 105 Wn.2d at 47 (emphasis added).

prejudiced, which it failed to do. Its primary argument was the joinder of Dwayne Walker, which had no merit because Bally Gaming had no claims against Dwayne Walker. Furthermore, the only issue tried in this case was the issue of damages, which would have been heard even if the trial had proceeded as an unlawful detainer action. There were no new claims between Bally Gaming and Internet Advancement that could have been litigated in this trial. Finding no reason to delay trial, the court properly exercised its discretion in proceeding as it did.

B. Evidentiary Rulings

Internet Advancement challenges the trial court's admission of the Sublease and of testimony regarding CAM charges. We review the trial court's evidentiary rulings for manifest abuse of discretion and will not overturn them unless the trial court has taken a view no reasonable person would take or applied the wrong legal standard.<sup>9</sup>

1. Sublease

Five days before trial, the parties filed a joint statement of evidence signed by counsel for both parties that represented that the Sublease would be offered by both parties without objection. At trial, however, Internet Advancement objected to the admission of the Sublease, arguing that it was hearsay. Despite Internet Advancement's previous stipulation to its admissibility, the trial court allowed Internet Advancement to argue why it should not be admitted. The court ultimately admitted the Sublease under the business records exception to the hearsay rule.

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<sup>9</sup> Cox, 141 Wn.2d at 439.



Internet Advancement argues that the Sublease should not have been admitted as a business record because the witness who identified the document was not qualified to do so and because the document was not prepared in the regular course of business. The business records exception to hearsay is codified in RCW 5.45.020 and provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Reviewing courts interpret the terms “custodian” and “other qualified witness” broadly.<sup>10</sup>

The exception does not require that the person who actually made the document provide the foundation but allows testimony by a person who has custody of the document as a regular part of his work or supervision over its creation.<sup>11</sup> The trial court found that as a vice president for Bally Gaming’s western operations, McCafferty had supervision over the creation of the Sublease and was qualified to identify the document. This was not an abuse of discretion.

Internet Advancement argues that the Sublease was not created in the “regular course of business” because entering into lease agreements was not part of Bally Gaming’s usual business as a developer and manufacture of slot machine software products. In admitting the Sublease, the trial court correctly noted that the “regular

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<sup>10</sup> State v. Quincy, 122 Wn. App. 395, 399, 95 P.3d 353 (2004).

<sup>11</sup> Quincy, 122 Wn. App. at 399.

course of business” does not mean that the activity is the goal of the business. This court has previously held that a business record need not be from a full-time business, stating that “a moonlighting accountant’s records would satisfy the conditions of the statute as much as those of an established firm.”<sup>12</sup> Similarly, it is irrelevant that entering into commercial lease agreements is not Bally Gaming’s full-time business, as long as the records were entered into as a regular part of Bally Gaming’s business activities.

Furthermore, the trial court articulated additional reasons for admitting the Sublease, including the fact that Internet Advancement’s witness was familiar with the document and that Internet Advancement had admitted in its answer that it had signed a lease and did not offer any evidence to show that the proffered document was not the operable lease. Finally, the fact that Internet Advancement had stipulated to its admissibility before trial would have been sufficient on its own to allow the Sublease into evidence. The trial court did not abuse its discretion when it admitted the Sublease.

## 2. CAM Testimony

At trial, Bally Gaming offered a document called an “aging report,” which listed the amounts of Internet Advancement’s rent including CAM charges, and the amounts Internet Advancement had paid (or not paid) toward its rent each month. Internet Advancement successfully objected to the document, and it was never admitted.

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<sup>12</sup> Fies v. Storey, 21 Wn. App. 413, 417, 585 P.2d 190 (1978), overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).

However, during portions of John McCafferty's testimony, he appeared to be referring to or reading from this document. When Internet Advancement objected to the improper use of the document beyond refreshing the witness's memory, the trial court sustained the objections. The trial court only allowed McCafferty to use this document to refresh his recollection as to when Internet Advancement had failed to pay rent, not as to the amount of CAM charges.

McCafferty testified without objection that he knew Internet Advancement was obligated to pay CAM charges under the Sublease. He testified that for September 2007, Internet Advancement prepaid its monthly base rent of \$22,240.25 plus \$11,119.75 in operating costs and real property taxes, or CAM charges. He testified that CAM charges were based on the Lease and that Bally Gaming paid those fees and passed them on directly to Internet Advancement. CAM charges were established at the beginning of the year by Bally Gaming's landlord and were an estimate of actual charges. If the estimate resulted in overpayment by the renter, it was reimbursed at the end of the year; if CAM charges were underpaid, the renter would be charged the additional amount. McCafferty did not know the exact amount of the CAM charges paid by Bally Gaming but testified that the estimated charges in 2007 were \$11,119.75. He also did not know the exact amount of the CAM charges for 2008, but he knew they were higher than in 2007 and thought they had increased by about \$1,250 per month.

The trial court did not abuse its discretion. It sustained Internet Advancement's objections regarding McCafferty's reading from the unadmitted document and based its

decision on evidence properly admitted.

C. Judgment Amount

Internet Advancement challenges the trial court's judgment, arguing that the findings of fact supporting the judgment are not supported by the record. We affirm.

Where the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the findings and whether the findings support the court's conclusions of law and judgment.<sup>13</sup> The record supports the trial court's findings that the Sublease required Internet Advancement to pay CAM charges in addition to rent. McCafferty testified that the estimated CAM charges for 2007 were \$11,119.75 per month, and Internet Advancement did not present any evidence showing that number was inaccurate. Although he also testified that CAM charges increased by approximately \$1,250 in 2008, the trial court found there was insufficient evidence to support CAM charges over \$11,119 because McCafferty was uncertain about the amount.

In sum, Bally Gaming's evidence that Internet Advancement was obligated to pay CAM charges as part of its lease obligations was not refuted. While there was no evidence regarding the exact amount of CAM charges in 2008, there was evidence that the 2008 charges were higher than the 2007 charges. Thus, there was sufficient evidence to support a finding that Internet Advancement was obligated to pay CAM charges and rent, that the CAM charges were at least \$11,119 per month, and that it

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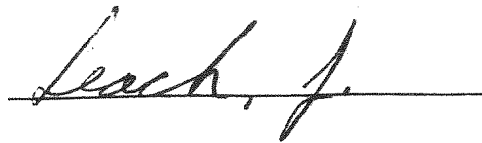
<sup>13</sup> Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

failed to fulfill those obligations.

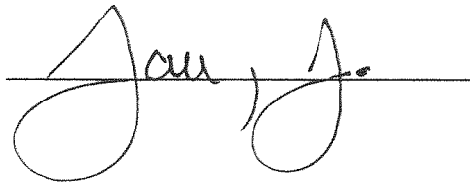
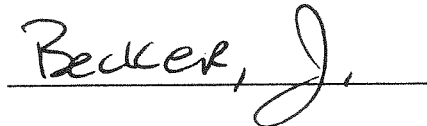
D. Attorney Fees

Bally Gaming requests attorney fees on appeal under ¶ 14.2 of the Lease and RAP 18.1. The trial court held that Bally Gaming was entitled to attorney fees, and Internet Advancement has not assigned error to that finding. A contractual provision for attorney fees at trial supports an award of attorney fees on appeal.<sup>14</sup> As the prevailing party on appeal, Bally Gaming is entitled to reasonable attorney fees.

Affirmed.

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WE CONCUR:

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<sup>14</sup> IBF, LLC v. Heuft, 141 Wn. App. 624, 639, 174 P.3d 95 (2007).